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APR 11 2011

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI**

**JEANNE HICKS, Clerk**  
By: Rita Storms

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: April 11, 2011

TITLE:

COUNSEL:

STATE OF ARIZONA

Sheila Sullivan Polk  
Yavapai County Attorney  
Bill Hughes, Esq.  
Steven Sisneros, Esq.  
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

JAMES ARTHUR RAY

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355 S. Grand Avenue, 35<sup>th</sup> Fl.  
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(Defendant)

(For Defendant)

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**UNDER ADVISEMENT RULING ON DEFENDANT'S MOTION IN LIMINE NO. 8  
TO EXCLUDE TESTIMONY OF STEVEN PACE**

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The Court has considered the motion, the response, the reply and the arguments of counsel. The arguments relating to the admissibility of evidence relevant only to what is potentially a lesser-included offense of negligent homicide also apply to this motion.

At the outset the Court notes that it does not accept the Defendant's repeated argument based on the distinction between individual and corporate (or organizational) responsibilities or duties. This Court has made clear its determination that any criminal culpability in this case, a case that involves charges against an individual, cannot be based on principles of vicarious or imputed liability. In order for the State to prevail, it must prove beyond a reasonable doubt that the deaths of the alleged victims were legally caused by the Defendant's own conduct or omissions. To the extent that the State's case rests on proof of omissions, the State must establish that the Defendant had a legal duty in relation to the decedents and that the legal duty derived from some source other than the criminal statutes

defining the offense.

Although the Court does not believe it is appropriate to declare the testimony of Steven Pace inadmissible in the absence of the State being given the opportunity to establish appropriate foundation, it appears that the proffered testimony would not be admissible under Rule 702 of the Arizona Rules of Evidence. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Based on the information presented to this Court, Mr. Pace's testimony would not be of assistance to the jury in the manner required by Rule 702.

In charging the Defendant with manslaughter, the State elected to allege that the Defendant actually knew (not that he should have known) that he was subjecting the sweat lodge participants to a substantial and unjustifiable risk of death but consciously chose to proceed notwithstanding that actual knowledge or awareness. This Court concludes that it is unlikely that an expert in risk management for outdoor adventure activities would assist the jury in understanding any factual issue pertinent to the manslaughter charges in this case.

The State cites *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 228 P.3d 909 (App.2010) in support of its argument for the admissibility of Pace's testimony. The Arizona Court of Appeals in that case stated that

[w]e do not suggest . . . that a breach of every common law, statutory or other duty is potentially criminal. Indeed the facts of this case present unique, unusual and extraordinary circumstances where the risk of harm was great and the conduct particularly egregious.

*Id.*, 224 Ariz. 173, FN 13, 228 P.3d 909. Assuming for purposes of this motion that the foregoing description applies to the facts in the present case, an expert witness with the knowledge attributed by the State to Mr. Pace would not assist the jury in the manner afforded jurors by expert testimony in *Far West Water & Sewer*.

*Far West Water & Sewer* involved allegations that the defendant violated specific OSHA regulations and industry standards. Expert testimony in that case was potentially useful for jurors in the following respects: (1) in determining whether the defendant failed to perform a duty imposed by law, and (2) in determining whether the risk caused by the defendant's conduct was "of such nature and degree" that either disregard of or failure to perceive the risk, "constituted a gross deviation from the standard of care or conduct under a reasonable person standard for purposes of Title 13 offenses." *Id.*, 224 Ariz. at 193, 228 P.2d at 929. In contrast, from the information provided to this Court there is no indication Mr. Pace has any specialized knowledge as to any specific governmental regulation or industry standard that applies to persons facilitating sweat lodge ceremonies or events. There has been no indication that he would be able to provide expert opinions going to the questions of whether a person who conducts a sweat lodge ceremony in an improper manner, as alleged in this case, creates a substantial risk of death and acts in a manner that

is "extreme, outrageous, heinous, or grievous so as to constitute a gross deviation from the relevant standard of conduct." *Id.*, 224 Ariz. at 200, 228 P.3d at 937 (citation omitted).

Furthermore, absent substantial proof that Mr. Ray had actual knowledge of any applicable regulations or industry standards, Pace's testimony would, at most, apply to possible negligent conduct or omissions, not to reckless conduct or omissions. As discussed separately with regard to the parties' memoranda concerning admissibility of evidence relating to a lesser-included offense, the Court concludes that evidence solely relevant and otherwise admissible as to a charge of negligent homicide is not admissible in this manslaughter case.

Subject to the qualification discussed above,

IT IS ORDERED **granting** the Defendant's motion in limine.

DATED this 17<sup>th</sup> day of April, 2011.

  
**Warren R. Darrow**  
**Superior Court Judge**

cc: Victim Services Division